

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JASON GILLIS

Claimant

VS.

WADE QUARRIES, INC.

Respondent

AND

BITUMINOUS CASUALTY CORP.

Insurance Carrier

Docket No. **1,043,447**

ORDER

Claimant requested review of the February 8, 2010 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on May 4, 2010.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Denise E. Tomasic of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained a 9 percent permanent partial scheduled disability to his right shoulder due to an accidental injury arising out of and in the course of employment.

Claimant requests review of the nature and extent of disability. Claimant argues that the evidence shows he suffered permanent impairment to his cervical spine as well as the shoulder. Consequently, claimant argues he should be compensated for a whole person functional impairment pursuant to K.S.A. 44-510e.

Respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of disability, specifically, whether claimant is entitled to a permanent partial disability for a K.S.A. 44-510d scheduled injury or a K.S.A. 44-510e whole person functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

The dispositive issue is whether claimant injured his cervical spine in the incident when his shoulder popped while he was swinging a sledgehammer. If so, claimant is entitled to compensation for a whole person functional impairment pursuant to K.S.A. 44-510e. If not, claimant is limited to compensation for a scheduled disability to his shoulder pursuant to K.S.A. 44-510d.

Briefly stated, after the accidental injury on December 22, 2006, claimant received treatment for his right shoulder complaints and arthroscopic surgery was performed on claimant's right shoulder by Dr. Mark Rasmussen in December 2007. Dr. Rasmussen released claimant to return to work without any permanent restrictions on March 27, 2009. Dr. Rasmussen testified that during the entire course of treatment claimant never made complaints of cervical pain.

It was not until Dr. John Pazell, claimant's medical expert, performed a physical examination of claimant on March 16, 2009, to provide a rating for this litigation that a cervical complaint appears in the medical records. And claimant provided a history of cervical pain that started with the December 2006 incident and never improved. Both Drs. Pazell and Dr. Bieri noted that there were no cervical complaints in the medical treatment records. Dr. Bieri further noted that claimant's history was inconsistent with the treatment records. And Dr. Pazell agreed that claimant's cervical complaints were inconsistent with the right shoulder injury.

The ALJ noted that if claimant's history of constant cervical pain was adopted then it would appear his cervical impairment was caused by the work-related incident. Conversely, if the history of no cervical complaints in the medical treatment records was adopted then a first complaint of cervical pain over two years after the work-related incident would not be causally related. The ALJ concluded claimant's credibility was a key factor in that determination. The ALJ then addressed several instances in the evidentiary record

which undermined claimant's veracity. Consequently, the ALJ concluded claimant had only suffered a K.S.A. 44-510d scheduled disability to his right shoulder.

Here, the ALJ had the opportunity to personally observe the claimant testify in person. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge claimant's credibility by personally observing him testify. After reviewing the entire evidentiary record the Board agrees that the ALJ's analysis of the evidence is correct and affirms the Award.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 8, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of June 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge